IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78 807

PLEASURE DRIVEWAY AND PARK DISTRICT OF PEORIA, ILLINOIS, AN ILLINOIS POLITICAL SUBDIVISION, JOHN R. CANTERBURY, JAMES A. CUMMINGS, BONNIE W. NOBLE, CLYDE WEST, HAROLD A. (PETE) VONACHEN, JR., INDIVIDUALLY AND MEMBERS OF THE BOARD OF TRUSTEES OF THE PLEASURE DRIVEWAY AND PARK DISTRICT OF PEORIA; RHODELL E. OWENS, INDIVIDUALLY AND AS DIRECTOR OF PARKS AND RECREATION; JACK M. FULLER, INDIVIDUALLY AND AS ADMINISTRATIVE ASSISTANT; DANIEL B. OPPLEMILLER, INDIVIDUALLY AND AS BUSINESS ADMINISTRATOR; FRANK D. BORROR, INDIVIDUALLY AND AS SUPERINTENDENT OF MAINTENANCE; WILLIAM McD. FREDERICK, INDIVIDUALLY AND AS ATTORNEY OF PLEASURE DRIVEWAY & PARK DISTRICT OF PEORIA,
Petitioners,

vs.

WILLIAM KUREK, WALTER DURDLE, ROBERT TOGIKAWA, EDWIN JONES AND RICHARD HOADLEY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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INDEX.

INDEX TO CITATIONS.

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STATEMENT.

The appeal in this case followed the District Court's dismissal of respondents' two count complaint. Count I alleges antitrust violations under 15 U. S. C. §§ 1, *et seq.* and 28 U. S. C.

§ 1337. Count II alleges deprivations of federal rights under color of law and invokes 28 U. S. C. § 1343 and 42 U. S. C. § 1983.

On May 26, 1977, the Seventh Circuit reversed and remanded on both counts. [*Kurek* v. *Pleasure Driveway & Park District*, 557 F. 2d 580 (7th Cir., 1977)].[1] Petitioners' petition for rehearing and for rehearing *en banc* were denied on August 11, 1977. On August 22, 1977, the 7th Circuit granted their motion for stay of mandate.[2]

On September 19, 1977, petitioners filed their petition for certiorari [*Pleasure Driveway & Park District* v. *Kurek* (Supreme Court No. 77-440)] and presented, *inter alia*, the following questions:

> Whether Petitioners are subject to the Federal Antitrust Laws and treble damage liability?
>
> Whether a Federal Court of Appeals may properly afford respondents additional opportunities to relitigate claims previously adjudicated in the Courts of Illinois and federal courts or review those state court adjudications?[3]

On March 29, 1978, this Court decided *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. ....., 98 S. Ct. 1123 and affirmed the opinion and judgment of the 5th Circuit in *City of Lafayette* v. *Louisiana Power & Light Co.*, 532 F. 2d

1. This opinion is reproduced as Appendix C to the Petition for Certiorari.

2. Presumably because this Court had granted certiorari in *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. ..... on March 28, 1977.

3. As stated in their pending petition for certiorari, petitioners again present these questions thusly [Petition, 2]:

> 1. Whether determination of facts in state court litigation which are essential to federal claims precludes relitigation of those factual issues in subsequent federal antitrust and civil rights actions?
>
> 2. Whether the actions of a unit of local government, taken pursuant to the requirements of state statute and clearly articulated state policy which provides for active supervision are exempt from federal antitrust laws?

431.[4] On April 24, 1978, this Court entered the following order in this case:[5]

> The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. ..... (1978).[6]

On September 11, 1978, the 7th Circuit filed its opinion "On Remand from the Supreme Court of the United States" [Pet. App. A-1 thru A-3] and declared, *inter alia:*

> As to plaintiffs' antitrust claims, which are the only ones affected by *Louisiana Power*, we reinstate our prior judgment finding as we do, that our prior decision correctly anticipated the Supreme Court's holding therein. Defendants' arguments that the antitrust claims have been adjudicated in the state court proceedings are insupportable both because the state courts have not in fact purported to do so and because jurisdiction of federal antitrust suits is exclusively in the federal courts. *See* 15 U. S. C. §§ 15, 26; 28 U. S. C. § 1337.[7] Needless to say, at the pleading stage at which this case is, we decline to consider defendants' numerous arguments that reduce effectively to the assertion that plaintiffs cannot prove the allegations *we*

4. Extensively quoted and relied upon by the 7th Circuit in its opinion of 5/26/77. [See: Pet. App., 18-19].

5. *Pleasure Driveway & Park District* v. *Kurek*, Supreme Court No. 77-440 [Pet. App., 4].

6. On the same date the Court entered precisely the same order in *City of Impact* v. *Whitworth*, No. 77-734 [citation below 559 F. 2d 378 (5th Cir., 1977)] and *Fairfax Hospital Assn.* v. *City of Fairfax*, No. 77-826 [Citation below 562 F. 2d 280 (4th Cir., 1977)]. See: Journal of Procedings, 46 U. S. L. W. at 3664.

7. In light of the questions presented in *Pleasure Driveway & Park District* v. *Kurek*, No. 77-440 and in light of the general grant of certiorari with remand limited to "further consideration in light of *City of Lafayette* v. *Louisiana Power & Light*" it can be reasonably argued that this Court has either resolved the questions now presented against the petitioners on the merits or at the very least has implied that they are not certworthy.

have held sufficient to state a claim for which relief can be granted.[8] [Emphasis added].

Moreover, the opinion concluded with the order that "The mandate shall issue forthwith." [Pet. App. 3].

On September 15, 1978, petitioners applied to the 7th Circuit for stay of mandate pending certiorari and suggested substantially the same questions as are here presented. On September 22, the application for stay was denied "as this court finds no merit in the request."

On, or about, September 25, 1978, petitioners filed their application for "an order recalling and staying the mandate of the Court of Appeals for the Seventh Circuit" in this Court [*Pleasure Driveway & Park District* v. *Kurek*, Supreme Court No. A-287] and presented, *inter alia*, the following questions in support of their claim concerning the likelihood of certiorari:

> Does the Court of Appeals properly apply the principles of collateral estoppel and res judicata in light of prior state and federal decisions from 5 years of litigation between these parties?

8. In its opinion of 5/26/77, the 7th Circuit at 557 F. 2d pp. 584-586 [Pet. App. A-8 thru A-11] set out the allegations with some particularity and summarized thusly:

> On January 29, 1974, the Park District terminated plaintiffs' concession rights and on February 20 of that year the Park District terminated plaintiffs' employment. On January 23, 1974, GSM was awarded pro shop concession rights at all of the Park District's five golf courses. The reasons for these events and the manner in which they came about are at the heart of this lawsuit. [557 F. 2d at 585 (Pet. App., A-8)].
>
> [T]he complaint . . . charges that the threat of a monopolistic license to GSM and the demand for uniformly increased fees were used by the defendants in a broader conspiracy to coerce plaintiffs into raising and fixing their retail prices, and that the award of the GSM license was made to punish plaintiffs for refusing so to be coerced. [557 F. 2d at 587 (Pet. App., A-12)].
>
> Nothing in the Illinois statutory provisions governing park districts even remotely suggests that Illinois has authorized, let alone compelled, park districts to enrich themselves by coercing horizontal retail competitors operating under concession licenses to fix retail prices in what would otherwise be a plain violation of the Sherman Act. [557 F. 2d at 590 (Pet. App., A-19)].

> Does the Court of Appeals opinion properly apply the Supreme Court test as stated in *City of Lafayette, supra,* where the defendant park district is authorized by the state legislature to carry on the activity complained of *AND* when the state legislature has mandated or directed the method employed by that unit of local government, i.e. the competitive bidding requirement of the Illinois Purchase Act, Ch. 127, § 132.1 *et seq.*, Ill. Rev. Stat. (1973)?

On, or about, October 2, 1978, respondents filed their "Opposition To Petitioners' Application For Stay/Recall of Mandate" and the application was denied by Mr. Chief Justice Burger on October 5, 1978.

On or about November 15, 1978, petitioners filed this pending petition for certiorari and again presents the questions as follows:

> 1. Whether determination of facts in state court litigation which are essential to federal claims precludes relitigation of those factual issues in subsequent federal antitrust and civil rights actions?
>
> 2. Whether the actions of a unit of local government, taken pursuant to the requirements of state statute and clearly articulated state policy which provides for active supervision are exempt from federal antitrust laws?

ARGUMENT.

I.

A.

Petitioners' plea concerning the "doctrine of issue preclusion" [Pet. 14][9] is nothing short of perplexing. If it operated in the antitrust area—which it does not—it would operate in favor of respondents.

The state court decision primarily relied upon is *Pleasure Driveway & Park District* v. *Kurek*, 27 Ill. App. 3d 60, 325

9. Collateral estoppel.

N. E. 2d 650 (3d Dist., 1975)]. It was a forcible detainer case which held that each respondent's yearly concession agreement expired by its terms on December 31, 1973, that respondents were entitled to thereafter remain in possession in order to negotiate new contracts despite the GSM bid and that respondents' employment rights were separate from their business rights *a fortiori* not germane to the issue of possession. That opinion further found [Petition Appendix J, A-64 & A-65]:

> In November of 1973 negotiations commenced between the Park Board and the golf pros (respondents) for the 1974 contracts and the Park Board also prepared bid specifications for concession rights for 1974. *Having failed to reach agreement with the defendants (respondents), the Park Board on January 19, 1974, awarded a three year contract for concession rights to Golf Shop Management, Inc.* (GSM) *with the stated intention of continuing (their) employment as greenskeepers.* On January 21, 1974 each of the five golf pros (respondents) were served with a 30-day notice to terminate tenancy of the premises occupied by the concession shops and on February 20, 1974, the Park District filed its complaint in this cause to recover possession of the five golf pro shops at its golf courses (footnote omitted). *On the same date the Park Board terminated the employment of the golf pros* (respondents) as greenskeepers. [Emphasis added].

When fleshed by the evidence showing that "having failed to reach agreement with the (respondents)" was the abortive attempt to coerce them into price fixing agreements, the state court judgment supports rather than defeats the following findings by the 7th Circuit:

> On January 19, 1974, the Park District terminated plaintiffs' concession rights and on February 20 of that year the Park District terminated plaintiffs' employment. On January 23, 1974, GSM was awarded pro shop concession rights at all of the Park District's five golf courses. *The reason for these events and the manner in which they came about are at the heart of this lawsuit.* [Pet. App. A-8 (Emphasis added)].

> [T]he complaint . . . charges that the threat of a monopolistic license to GSM and the demand for uniformly increased fees were used by defendants in a broader conspiracy *to coerce plaintiffs into raising prices and that the award of the GSM license was made to punish plaintiffs for refusing so to be coerced.* [Pet. App. A-12 (Emphasis added)].

But in any event, the 7th Circuit has here held that "Defendants' arguments that the antitrust claims have been adjudicated in state court proceedings are insupportable both because the state courts have not in fact purported to do so and because jurisdiction of federal antitrust suits is exclusively in the federal courts. *See* 15 U. S. C. §§ 15, 26; 28 U. S. C. § 1337" [Pet. App. A-1 & A-2]. This has long been the rule. [See e.g.: *Freeman* v. *Bee Machine Co.*, 319 U. S. 448; *General Investment Co.* v. *Lake Shore & Mich. So. R. Co.*, 260 U. S. 261].

In terms of this case, the principle was nicely stated by Judge Learned Hand in *Lyons* v. *Westinghouse Electric Corp.*, 222 F. 2d 184, 189 (2d Cir., 1955), thusly:

> In the case at bar it appears to us that the grant of the district courts of exclusive jurisdiction over the action for treble damages should be taken to imply an immunity of their decisions from any prejudgment elsewhere; *at least on occasions like those at bar, where the pututive estoppel includes the whole nexus of facts that make up the wrong.* The remedy provided is not solely civil; ⅔rds, of the recovery is not remedial and inevitably presupposes a punitive purpose. It is like a *qui tam* action, except that the plaintiff keeps all the penalty, instead of sharing it with the sovereign. There are sound reasons for assuming that such recovery should not be subject to the determinations of state courts. It was part of the effort to prevent monopoly and restrains of commerce, and it was natural to wish it to be uniformly administered, being national in scope. . . . Obviously, an administration of the Acts at once effective and uniform would best be accomplished by an untrammeled jurisdiction of the federal courts. [Emphasis added].

B.

In the words of the court below, Count II of "the complaint charged that plaintiffs were summarily terminated from their public employment positions because they asserted their rights of petition and to due process by litigating their defenses to the Park District's forcible entry and detained action" [Pet. App. A-27].

Petitioners also misstate the civil rights claims. At page 16 of the Petition they say:

> If a litigant chooses to advance his civil rights claims in state court forums, though not required to *and* unreservedly litigates those claims there, he may not ignore adverse state decisions and relitigate the claim in District Court. (Citations).

At the very least, this implies that respondents "advance(d) (their) civil rights claims in state Court" and "unreservedly litigate(d) those claims there",[10] and that is not the truth.

In pertinent part, the relevant state court pleading claimed as follows:[11]

> 6. That at all times relevant and material to the transactions in controversy, the PARK DISTRICT . . . *tortiously interferred*[12] (emphasis added) with the (golf pros) and each of them in . . . the following way:

10. In state court the employment termination claim was by way of counterclaim and the only counterdefendant was the Park District as such. *Monell* v. *New York City Dept. of Social Services*, ... U. S. ..... (46 U. S. L. W. 4569) was not decided until June 6, 1978. Thus, the PARK DISTRICT, as such, wasn't even subject to federal civil rights liability at the time of the state court action.

11. This counterclaim is in the record on appeal as Exhibit V to petitioners' motion to dismiss. The state court findings and judgment is Exhibit Z to the motion to dismiss.

12. "Tortious interference" constitutes a common law cause of action in Illinois. [See e.g.: *City of Rock Falls* v. *Chicago Title & Trust*, 13 Ill. App. 3d 359, 300 N. E. 2d 331]. It has nothing whatever to do with the federal right of petition or with any other right or interest protected under the Petition and Due Process Clauses of the 14th Amendment.

> They summarily and unlawfully terminated defendants' (respondents) salaried employments.

Based upon this counterclaim and the findings and judgment denying it, the 7th Circuit held that the principles of collateral estoppel are not applicable and further found:

> Judge Iben's[13] determination . . . implies . . . that the employment terminations occurred because plaintiffs chose to litigate their rights to possession. In fact the finding expressly refers to plaintiffs' insistence 'through litigation and other ways' on asserting their claim to possession. *Nothing in the state court judgment supports the district court's conclusion that it had been previously adjudicated that 'the exercise of the right to litigate issues' was not the reason for plaintiffs' employment discharges.* [Pet. App. A-29 (Emphasis added)].

" 'A prior judgment operates as a collateral estoppel as to, but only as to, those matters or points which were in issue or controverted *and upon the determination of which the initial judgment necessarily depended.*' [Emphasis in the opinion]. 1 B Moore's Federal Practice 3777 (2d ed., 1965), and, as Judge Learned Hand explained almost forty years before, '. . . [collateral] estoppel extends only to facts decided and necessary to the decision.' Irving Nat. Bank v. Law, 10 F. 2d 721, 724 (2 Cir., 1926)." [*Bourne, Inc.* v. *Allen-Bradley Company*, 480 F. 2d 123, 125 (7th Cir., 1973)].[14]

All that was decided by the Circuit Court of Peoria County was that respondents' terminations because they exercised "the

13. Judge Iben was the state court trial judge.

14. Petitioners' insistent reliance on certain language in *Pleasure Driveway & Park District* v. *Jones*, 51 Ill. App. 3d 182, 367 N. E. 2d 111 (7/11/77) was here before and rejected. [*Pleasure Driveway & Park District* v. *Kurek*, No. 77-440 (Pet. for Cert. pp. 23-24)]. Moreover, all that the Illinois Appellate Court said was that "all the reasons why defendants' (respondents) discharge should be considered wrongful . . . could have been argued and resolved in the case before the circuit court of Peoria County." [Petition 17, Pet. App. A-83]. Even the petitioners concede that *res judicata* is not here applicable. Thus, "what could have been argued and resolved" isn't even relevant, let alone material.

right to litigate issues" did not subject the Park District to liability under Illinois' common law doctrine of tortious interference and the 7th Circuit's holding that "Nothing in the state court judgment supports the district court's conclusion that it had been previously adjudicated that 'the exercise of the right to litigate issues' was not the reason for pliantiffs' employment discharges" [Pet. App. A-29] is clearly correct.

II.

It is impossible to determine just what facts petitioners' rely on in support of their proposition that "The Decision Below Interprets *City of Lafayette, La.* v. *La. Power & Light Co.* to subject a Non-Municipal Unit of State Government Acting Pursuant to the Requirements of State Statute and Clearly Articulated State Policy to Alleged Violations of the Federal Antitrust Laws." From the following, it appears that the petitioners assert that respondents' terminations and concomitant damages resulted from their refusals to enter into competitive bidding,[15] *viz:*

> The instant case involves actions of the Park District . . . taken pursuant to state statutory direction. The Illinois Legislature has by statute clearly said that competitive bidding is the rule in public contracts and sufficient charges for the use of public facilities must be made. Ch. 127, § 132.2 and Ch. 105 § 9.1-1, *et seq.*, Ill. Rev. Stat. (1975). [Petition, 19-20].
>
> If no exemption applies in this case, the next competitive bid in Illinois . . . invites any . . . non-bidder to sue the governmental unit for antitrust violations. The only alternative[16] is to comply with the antitrust laws and violate the state laws requiring competitive bidding. [Petition, 20].

15. If this were the case, then why did petitioners use the highest bidder in the abortive attempt to coerce the non-bidding respondents into *per se* violations of § 1 of the Sherman Act. [See: 557 F. 2d at 585-586 (Pet. App. A-9 & A-10)].

16. Petitioners had an alternative in this case. They could have awarded the bidder the rights rather than using his bid as part of a coercive scheme to force the non-bidding respondents into *per se* violations of § 1 of the Sherman Act.

> These requirements, imposed by the Illinois Legislature in addition to the provisions and expressed purpose of the competitive bidding act, are a clear and explicit mandate from the legislature. [Petition, p. 23].

As is evident from the following excerpts from the principal opinion of the 7th Circuit [*Kurek* v. *Pleasure Driveway & Park District,* 557 F. 2d 580 (Pet. App. C)], this is simply not the case.

> On January 19, 1974, the Park District terminated plaintiffs' concession rights and on February 20 of that year the Park District terminated plaintiffs' employment. On January 23, 1974, GSM was awarded pro shop concession rights at all of the Park District's five golf courses. *The reason for these events and the manner in which they came about are at the heart of this lawsuit.* [Pet. App. A-8 (Emphasis added)].
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> Nothing in the Illinois statutory provisions governing park districts even remotely suggests that Illinois has authorized, let alone compelled, park districts to enrich themselves *by coercing horizontal retail competitors* operating under concession licenses *to fix retail prices in what would otherwise be a plain violation of the Sherman Act.* [Pet. App. A-19 (Emphasis added)].

In its entirety, petitioners' argument constitutes nothing more than abstract hypothesis and does nothing more than suggest this question—How can petitioners persist in their refusal to recognize the case and in the same breath ask the Supreme Court of the United States to grant plenary review?

CONCLUSION.

For the foregoing reasons and for others implicit therein, respondents request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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